Supreme Court, U.S.
FILED

(1)

No. 99- 991819 MAY 1 2000

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

KEVIN NICKERSON; ANGELA NICKERSON; AND NEAL HARVILLE,

Petitioners,

v.

STATE OF TEXAS, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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April 28, 2000

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103 pp

QUESTION PRESENTED

I. Whether the trial court should have applied the federal doctrine of equitable tolling to a 42 U.S.C. § 1983 action brought after the conclusion of the underlying criminal action.

PARTIES TO PROCEEDING

The parties to the proceeding in the United States Court of Appeals for the Fifth Circuit were Kevin Nickerson, Angela Nickerson and Neal Harville and the State of Texas, et al.

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The opinion of the United States Court of Appeals for the Fifth Circuit on original submission is reproduced in the Appendix at 1a-9a.

JURISDICTION

In January 31, 2000, the Fifth Circuit Court of Appeals affirmed the judgment of the trial court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL PROVISIONS AND STATUTES

The text of the following constitutional provisions and statutes are reproduced in the Addendum at p. 19.

Fourth Amendment
Fifth Amendment
Sixth Amendment
Fourteenth Amendment
42 U.S.C. § 1983

STATEMENT OF THE CASE

This case presents the question, over which the lower courts are sharply divided, of whether the federal law of equitable tolling applies to an action

under 42 U.S.C. § 1983 brought after the conclusion of the underlying criminal action. This question was raised but not decided in *Heck* v. *Humphrey*, 512 U.S. 477, 489 (1994).

The Fifth Circuit in the decision below joined the Third and Seventh Circuits in refusing to apply the equitable tolling doctrine. The Sixth and Ninth Circuits however, have held that the doctrine does apply to Section 1983 actions. This case represents a good vehicle to resolve the question left open in *Heck*.

(i) Proceedings in the Courts Below

Petitioners Kevin Nickerson, Angela Nickerson and Neal Harville filed suit in the United States District Court for the Eastern District of Texas Lufkin Division. The District Court dismissed Petitioners' federal and state law claims with prejudice on a 12(b)(6) motion. Subsequently, the United States Court of Appeals for the Fifth Circuit affirmed the District Court's ruling, holding Petitioners' claims were barred by the statute of limitations.

The appeal to the Court of Appeals was pursuant to 28 U.S.C. § 1291.

(ii) Facts

Petitioners, Kevin and Angela Nickerson and Neal Harville, are former employees of the Texas Department of Criminal Justice (hereinafter TDCJ), a State of Texas agency responsible for housing inmates and convicted felons. All three Petitioners had numerous years of experience in law enforcement, and Kevin Nickerson was a ranking officer, a sergeant. Texas has one of the largest prison populations in the nation, in fact on June 30, 1997, Texas had 136,599 prisoners under the jurisdiction of State or Federal correctional authorities, second only in total prison population to California. (Prison and Jail Inmates at Midyear 1997; Bureau of Justice Statistics Bulletin, January 1998, at http://sun.soci.niu.edu/~critcrim/prisons/prisons.html). Additionally, in 1994 Texas voters approved issuing $1.1 billion in bonds for new prison and jail construction. (Reske, Henry J. "Throwing Away the Key," *ABA Journal*, April 1994.)

During their employment as correction officers, Petitioners attempted to remedy wrongs in the prison unit where they worked by repeatedly raising concerns to their supervisors regarding health and safety problems. Their concerns primarily involved the safety of prison employees and inmates. Specifically, Petitioners reported to supervisors that several incidents of inmate assaults on correction officers remained unreported, broken or un-lockable doors resulted in uncontrollable and prohibited traffic of inmates, sexual relations were occurring between several correctional offi-

cers and inmates, inmates had access to computers, offices and telephones in violation of departmental rules, and inmates who should have been housed in administrative segregation were instead placed in low security areas, jeopardizing the safety of other inmates, staff and visitors.

Petitioners' complaints went unheeded by the TDCJ, resulting in a situation leading to several incidents of assault against correctional officers and culminating in an October 7, 1994 riot involving 250 inmates, in which several officers incurred physical injuries. Additionally, a security officer, about whose propensity to use excessive force against inmates Harville had repeatedly warned the TDCJ, was involved in a struggle with an inmate which resulted in the inmate's death.

In the midst of this highly volatile and violent environment, an incident occurred in which an inmate threw either spit or urine on Angela Nickerson. After receiving no response to her request that the officer in charge handle the situation, Nickerson resorted to her husband, Kevin Nickerson, for help. Subsequently, Angela and Kevin Nickerson and two other officers went into the inmate's cell and attempted to remove him. A struggle ensued and the inmate suffered minor scratches. It is uncontroverted that none of the four officers involved in the struggle used excessive force.

After the incident, Internal Affairs launched an investigation against the Nickersons and Harville,

while continuing to ignore fundamental problems with the prison, such as those reported by Petitioners. TDCJ and special prosecutors assigned to handle TDCJ cases proceeded with charges against the Petitioners in the face of evidence clearing the Petitioners of any wrongdoing. On June 3, 1996, both Angela and Kevin Nickerson were acquitted of all charges in a jury trial, and on June 11, 1996 TDCJ dropped all charges against Neal Harville. Yet to date, none of the Petitioners have been reinstated and Harville's record has not been fully expunged by the TDCJ.

As a response to the unjustifiable discharges, investigation and prosecution, Petitioners filed an action on June 3, 1998, in the United States District Court for the Eastern District of Texas, seeking declaratory and equitable relief, and compensatory and punitive damages. The District Court, refusing to allow them to replead, dismissed the Petitioners' federal and state law claims with prejudice on the basis that they were time-barred. Subsequently, the United States Court of Appeals for the Fifth Circuit affirmed the District Court's ruling, holding Petitioners' claims were barred by the statute of limitations. The Fifth Circuit held that Petitioners were required to bring their Section 1983, Section 1985 and all other federal and state claims prior to the conclusion of the criminal proceedings against them.

The Fifth Circuit erroneously refused to consider Petitioners' arguments concerning equitable tolling. In its decision, the Fifth Circuit stated in

a footnote, "For the first time on appeal, Plaintiffs argue in their reply brief that equitable tolling should be applied to their claims. However, we do not consider arguments made to us for the first time in a reply brief." (Decision of the Fifth Circuit in 99-40266 *Nickerson* v. *State of Texas*, at App. 5a, n.1).

Contrary to the statement in the Fifth Circuit's decision, Petitioners have previously raised the issue of equitable tolling and discussed this Court's decision in *Heck* v. *Humphrey*, 512 U.S. 477 (1994), at length. In their first brief to the Fifth Circuit, Petitioners stated,

> the plaintiffs repeatedly asserted in their Complaint (p. 4, p. 7) and Motion for New Trial or to Reconsider Motion to Dismiss that the plaintiffs' causes of action against TDCJ did not accrue until plaintiffs 'were acquitted or the cases dismissed.' (Motion for Reconsideration, 252) Therefore, at the heart of plaintiffs' case is the well-established maxim that the statute of limitations in a malicious prosecution case is not an issue, simply because the plaintiff 'has no cause of action under § 1983 unless and until the conviction or sentence is reversed, expunged, invalidated, or impugned by the grant of a writ of habeas corpus.' (*Heck* v. *Humphrey*, 512 U.S. 477, 489 (1994)) . . . All of

> these factors combine to establish a strong prohibition on proceeding with a claim of malicious prosecution before acquittal of the plaintiff.

(*see* Brief of the Plaintiffs-Appellants, at App. 10a-44a; Original Complaint, at App. 45a-62a; Motion for New Trial or to Reconsider the Motions to Dismiss, at App. 62a-73a).

Therefore, the Fifth Circuit had no basis for refusing to apply the doctrine of equitable tolling, since Petitioners had previously raised the issue of equitable tolling through discussing this Court's decision in *Heck*. The equitable tolling issue is squarely presented by this case.

As a result of the decisions of both the District Court and the Fifth Circuit, three prison guards who were investigated and prosecuted after reporting numerous violations within their prison unit have been denied a chance to bring their Section 1983 claims after being acquitted and cleared of all criminal charges. Not only has the tarnish on the Petitioners' names continued, but the State of Texas remains without three fine prison guards as a result of the continued denial of their re-employment. The decision made by the Fifth Circuit has a chilling effect on prison guards, because three Texas prison guards, who were simply attempting to remedy problems they encountered while working in the Texas prison system, were denied their day in court.

REASONS FOR GRANTING THE WRIT

I. Whether the trial court should have applied the federal doctrine of equitable tolling to a 42 U.S.C. § 1983 action brought after the conclusion of the underlying criminal action.

Among the Constitutional amendments at issue are the unreasonable arrests and seizures of the prison guards and the resulting violations of the Fourth and Fourteenth Amendments to the United States Constitution. Additionally, Petitioners suffered violations of their due process rights under the Fifth and Fourteenth Amendments.

In *Heck* v. *Humphrey*, 512 U.S. 477 (1994), this Court discussed the federal doctrine of equitable tolling and its application to actions brought under 42 U.S.C. § 1983. This Court found it unnecessary to address the "statute-of-limitations issue wrestled with by the Court of Appeals, which concluded that a federal doctrine of equitable tolling would apply to the § 1983 cause of action while state challenges to the conviction or sentence were being exhausted." *Heck*, 512 U.S. 477, 489.

Thus, this Court left open in *Heck* the very question presented by this case. Although *Heck* did not decide the issue, its reasoning strongly suggests that the rule adopted by the Fifth Circuit is erroneous. Instead, this Court held, "Under

our analysis the statute of limitations poses no difficulty while the state challenges are being pursued, since the § 1983 claim has not yet arisen. Just as a cause of action for malicious prosecution does not accrue until the criminal proceedings have terminated in the plaintiff s favor, . . . so also a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated." *Heck*, 512 U.S. 477, 489-90.

There are sound policy reasons for the equitable tolling doctrine. When a Section 1983 action is not filed until the termination of the underlying criminal proceeding, parallel litigation over issues of probable cause and guilt is avoided, and the anomalous possibility that the claimant could succeed in the tort action after having been convicted in the underlying criminal prosecution is avoided. Hence, the equitable tolling doctrine vindicates the strong judicial policy against the creation of two conflicting resolutions arising out of the same or identical transaction. *Heck*, 512 U.S. 477, 484. This Court clearly expressed the policy behind the decision in *Heck* by stating, "This Court has long expressed similar concerns for finality and consistency and has generally declined to expand opportunities for collateral attack." *Heck*, 512 U.S. 477, 484-85.

In the wake of the question left open in *Heck*, a dispute has arisen in the Circuit Courts regarding equitable tolling in 42 U.S.C. § 1983 actions.

This conflict is best illustrated through directly contradicting decisions on equitable tolling made in the Third, Fifth, Sixth, Seventh and Ninth Circuits. Petitioners submit that the approach taken by the Sixth and Ninth Circuits is correct, but in any event this Court should grant certiorari to resolve the circuit conflict.

The Third Circuit and the Ninth Circuit are in direct conflict regarding equitable tolling's application to Section 1983 actions for false arrest and false imprisonment. The Third Circuit refused to apply the federal doctrine of equitable tolling in a Section 1983 action for false arrest and false imprisonment and held that the limitation period began to run on the night of the arrest and detention. *Montgomery* v. *De Simone*, 159 F.3d 120 (3rd Cir. 1998); *see also Smith* v. *Holtz*, 87 F.3d 108 (3rd Cir. 1996) (refusing to apply equitable tolling in a Section 1983 action). However, in the same year, the Ninth Circuit held that under *Heck*, equitable tolling should apply to Section 1983 actions for false arrest and false imprisonment, and therefore such actions are not cognizable and did not accrue until the plaintiff s conviction was invalidated. *Cabrera* v. *City of Huntington Park*, 159 F.3d 374, 380 (9th Cir. 1998).

Another direct conflict exists in the Seventh Circuit and the Sixth Circuit. The Seventh Circuit refused to apply equitable tolling to a Section 1983 claim seeking damages for a violation of the Fourth Amendment, and instead held the Section 1983 claim accrued at the time of the unlawful

search and seizure. *Gonzalez* v. *Entress*, 133 F.3d 551, 553 (7th Cir. 1998). However, the Sixth Circuit applied equitable tolling to a similar claim and held that a Section 1983 action alleging an unconstitutional search or seizure is premature, and must be dismissed without prejudice, if brought while the plaintiff still faces criminal punishment. *Schilling* v. *White*, 58 F.3d 1081 (6th Cir. 1995).

In this case, the Fifth Circuit held that Petitioners were required to file their Section 1983 actions prior to the conclusion of the criminal proceedings against them. The application of equitable tolling to Section 1983 actions in the Sixth and Ninth Circuits demonstrates an understanding of the need to avoid potential conflicts between the civil court system and law enforcement, while at the same time ensuring that all civil plaintiffs are afforded the opportunity to bring their claims in court. However, in the present case, the Fifth Circuit dismissed the Section 1983 actions brought by three correctional officers and expressly refused to apply the federal doctrine of equitable tolling. The Fifth Circuit held, "Plaintiffs' claims . . . accrued well before June 1996. The district court did not err in holding that these claims were barred by the statute of limitations . . . Plaintiffs' claims against the investigators were wholly conclusional . . . [and] insufficient to support a § 1983 action." (Decision of the Fifth Circuit in 99-40266 *Nickerson* v. *State of Texas*, at App. 5a). The Fifth Circuit's decision clearly demonstrates the bad policy resulting from

the refusal of courts to apply the doctrine of equitable tolling in Section 1983 actions involving underlying criminal prosecutions, yielding decisions that both interfere with law enforcement and deny plaintiffs the right to their day in court.

By failing to apply the doctrine of equitable tolling in Section 1983 actions, courts such as the Third, Fifth and Seventh Circuits force parties to file their Section 1983 claims quickly, even though such claims, for example those involving qualified immunity, may interfere with underlying criminal investigations and the criminal justice system. Forcing plaintiffs to file their Section 1983 claims while a criminal investigation is proceeding opens the door to vexatious litigation, in which plaintiffs could attempt through discovery to probe the thoughts of prosecutors and secure the evidence of investigators, and also cause disruption to investigators and prosecutors who may be sued in their individual capacities. However, if the statute of limitations on Section 1983 actions were tolled, prosecutors would be allowed to undertake their jobs without the interference of a related civil action dividing their focus and causing potential delays in criminal trials.

Additionally, not tolling the statute of limitations for Section 1983 actions forces individuals to fight their civil battle while also fighting their criminal battle, in effect diminishing a plaintiff's resources and potentially denying plaintiffs' their Sixth Amendment right to effective assistance of counsel. Allowing Section 1983 actions to pro-

ceed at the same time as the underlying criminal investigation also potentially pits state courts against federal courts, by means of state criminal actions proceeding at the same time as federal Section 1983 actions, and the executive branch, by means of prosecutors, against the judicial branch.

Not only does the refusal to apply equitable tolling in Section 1983 actions have numerous policy drawbacks, but such a stance will be hard for courts to administer. For example, in the present case, the Fifth Circuit dismissed Petitioners' claims based on a 12(b)(6) motion for failure to state a claim, effectively tying the hands of these prison guards to defend themselves against the false allegations of prison inmates. The Fifth Circuit ruled, "To state a claim under § 1983, plaintiffs must allege that they have been injured by some constitutional violation of a defendant . . . [t]hat did not occur here . . . Having reviewed the complaint, however, we conclude that Plaintiffs claims against the investigators were wholly conclusional. We can find no factual support for the claims in the complaint; Plaintiffs merely asserted that coercion and 'irregular' witness statements occurred. These bare, conclusion allegations are insufficient to support a § 1983 action." (Decision of the Fifth Circuit in 99-40266 *Nickerson* v. *State of Texas*, at App. 5a).

The effect of the Fifth Circuit's decision was to impose a heightened pleading standard without authority and to force the court of appeals to

impermissibly speculate on the nature of Petitioners' lawsuit. The plaintiff is required to provide the defendant with fair notice of the claim and the ground upon which it rests. *Lone Star Indus., Inc.* v. *Hornan Family Trust*, 960 F.2d 917, 922 (10th Cir. 1992). To provide adequate notice, the complaint should state facts that give rise to the claim. *Walker* v. *South Cent. Bell Tel. Co.*, 904 F.2d 275, 277 (5th Cir. 1990). Although the Fifth Circuit held that Petitioners' claims were conclusory, Petitioners set forth specific facts in their Original Complaint. Petitioners claimed that witness statements were highly irregular and inaccurate, and that exculpatory evidence was available, which was ordered to be turned over to the defense in the underlying criminal matter, it never was. (Original Complaint, at App. 45a-61a).

The Fifth Circuit's action contradicts the decision made by this Court in *Leatherman* v. *Tarrant Cty. Narcotics Unit*, 507 U.S. 163, 168 (1993), which held that heightened factual specificity is not required in civil rights actions against municipalities. However, the Fifth Circuit erroneously applies *Leatherman* only in civil rights actions against municipalities, while still requiring heightened pleading in other civil rights cases, such as those against public officials in their individual capacities. *Baker* v. *Putnal*, 75 F.3d 190, 195 (5th Cir. 1996); *Todd* v. *Hawk*, 72 F.3d 443, 445-46 (5th Cir. 1995).

This Court has previously refused to impose a heightened pleading standard in Section 1983

claims involving the qualified immunity defense. This court stated, "Without such precedential grounding, for the courts of appeals or this Court to change the burden of proof for an entire category of claims would stray far from the traditional limits on judicial authority. Neither the text of § 1983 or any other federal statute, nor the Federal Rules of Civil Procedure, provides any support for imposing a clear and convincing burden of proof . . . [t]he unprecedented change . . . lacks any common law pedigree and alters the cause of action itself in a way that undermines the very purpose of § 1983-to provide a remedy for the violation of federal rights." *Crawford-El* v. *Britton*, 118 S.Ct. 1584, 1595 (1998).

This Court does recognize the need to protect public officials from unnecessary and burdensome discovery and trial proceedings. *Crawford-El*, 118 S.Ct. 1584, 1596. However, this Court granted guidance to trial judges regarding procedures available for handling such claims, by explaining "the district judge has two primary options . . . [f]irst, the court may order a reply to defendant's . . . answer under Federal Rule of Civil Procedure 7(a), or grant the defendant's motion for more definite statement under Rule 12(e)." *Id.* Additionally, in *Schultea* v. *Wood*, 47 F.3d 1427 (5th Cir. 1995), the Fifth Circuit addressed Section 1983 actions involving the defense of qualified immunity and urged trial courts to require plaintiffs to file a reply tailored to an answer pleading the defense of qualified immunity, allow limited discovery in the court's discretion, and

then determine whether the case can proceed under motion for summary judgment. Based on *Crawford-El* and *Schultea*, and pursuant to the Fifth and Fourteenth Amendments, the Fifth Circuit should have allowed Petitioners an opportunity to re-plead, instead of throwing out their claims on a 12(b)(6) motion, prior to any discovery or a motion for summary judgment. Although the primary facts may have occurred prior to June 3, 1996, there may very well have been other facts occurring afterwards that would have evidenced such a violation.

The Fifth Circuit was not clear on the nature of Petitioners' claims and instead of allowing Petitioners to re-plead, the court attempted to guess at the nature of the Petitioners' claims when no facts had been discovered. The Fifth Circuit's erroneous imposition of a heightened pleading standard and their refusal to allow Petitioners to re-plead violates Petitioners rights of access to courts and forces courts to engage in improper speculation as to the nature of a plaintiff's claim. This Court has previously addressed the issue of a party being denied access to court in *Boddie* v. *Connecticut*. In *Boddie*, this Court held access to courts "may not be placed beyond the reach of any individual." *Boddie* v. *Connecticut*, 401 U.S. 371, 382 (1971). See also *M.L.B.* v. *S.L.J.*, 519 U.S. 102, 113 (1997)(reaffirming Boddie). The effect of the Fifth Circuit's decision is to place access to court out of reach for plaintiffs who are involved in criminal actions or who use their resources in criminal cases but wait until those

criminal matters are resolved to bring their Section 1983 claims. These factors reinforce the need to apply the equitable tolling doctrine, and afford prison guards like the Petitioners the protection of the Constitution.

CONCLUSION

This Court should grant a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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ADDENDUM

AMENDMENT IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT V

No person shall he held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein

the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witness against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; not deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper

proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

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APPENDIX A

U.S. COURT OF APPEALS
F I L E D
JAN 31 2000
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-40266
Summary Calendar

KEVIN NICKERSON; ANGELA NICKERSON; and NEAL HARVILLE,

Plaintiffs-Appellants,

versus

STATE OF TEXAS; WAYNE SCOTT, Director of Operations in his Personal & Official Capacities; JAMES KEITH PRICE, Senior Warden, in his Personal & Official Capacities; JERRY JACKSON, Assistant Warden, in his Personal & Official Capacities; LATHAM BOONE, Special Prosecutor; RAY MONTGOMERY, Special Prosecutor; TOM DAVIS, Captain; JERRY CLEMENTS, Employee of the Texas Department of Criminal Justice Internal Affairs Division; DEBRA

LEONARD, Employee of the Texas Department of Criminal Justice Internal Affairs Division; ALAN POLUNSKY, Chairman; JOHN DAVID FRANZ, Member of the Texas Board of Criminal Justice; NANCY PATTON, Member of the Texas Board of Criminal Justice; CAROLE S. YOUNG, Member of the Texas Board of Criminal Justice; ALFRED MORAN, Member of the Texas Board of Criminal Justice; PATRICIA DAY, Member of the Texas Board of Criminal Justice; LAWRENCE FRANCIS, Member of the Texas Board of Criminal Justice; A. M. STINGFELLOW, Member of the Texas Board of Criminal Justice; CAROL VANCE, Member & Former Chairperson of the Texas Department of Criminal Justice, in their Official Capacities; UNIDENTIFIED PARTY, Unknown Agents or Employees of the Texas Department of Criminal Justice; ANDY COLLINS, Texas Department of Criminal Justice Institutional Division, Executive Director in his Official Capacity,

Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of Texas
USDC No. 9:98-CV-136

Before HIGGINBOTHAM, DeMOSS, and STEWART, Circuit Judges.

PER CURIAM:*

Kevin and Angela Nickerson and Neal Harville ("Plaintiffs"), former correctional officers of the Texas Department of Criminal Justice (TDCJ), appeal the district court's dismissal of their complaint with prejudice. Plaintiffs' claims arose. after they were accused of using improper force on an inmate, dismissed from their jobs, and faced with prosecution by the state. After a trial, the Nickersons were acquitted of all charges on June 3, 1996, and the charges against Harville were dropped on June 13, 1996. Plaintiffs filed their complaint on June 3, 1998.

We review de novo a district court's dismissal of a complaint pursuant to Rule 12(b)(6). Capital Parks, Inc. v. Southeastern Adver. & Sales Sys., Inc., 30 F.3d 627, 629 (5th Cir. 1994). We will uphold such a dismissal "only if it appears that no relief could be granted under any set of facts that could be proven consistent with the allegations." Id. (citation omitted). We accept all well-pleaded facts as true and view them in the light most favorable to the plaintiff. Id.

Plaintiffs argue that the district court erred by dismissing their 42 U.S.C. § 1983 claims as barred by the statute of limitations. There is no federal statute of limitations for § 1983 actions, and the federal courts borrow the forum state's general personal injury limitations period. Owens

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* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except undeer the limited circumstances set forth in 5TH CIR. R. 47.5.4.

v. Okure, 488 U.S. 235, 249-50 (1989). In Texas, the relevant limitations period is two years. Henson-El v. Rogers, 923 F.2d 51, 52 (5th Cir. 1991). Although the federal courts look to state law to determine the applicable statute of limitations, they look to federal law to determine when a cause of action accrues. Pete v. Metcalfe, 8 F.3d 214, 217 (5th Cir. 1993). Under Heck v. Humphrey, 512 U.S. 477, 489 (1994), and similar cases, if the "termination of [an] underlying criminal proceeding in favor of the accused is an essential element of a § 1983 claim," the claim accrues only when the favorable termination occurs. Brummett v. Camble, 946 F.2d 1178, 1184 (5th Cir. 1991). If favorable termination is not required, a claim accrues immediately. See, e.g., Woods v. Smith, 60 F.3d 1161, 1165 (5th Cir. 1995). The rule of Heck applies whenever a judgment in the accused's favor would have necessarily implied that the accused was innocent. Wells v. Bonner, 45 F.3d 90, 94 (5th Cir. 1995).

Plaintiffs were not specific in their complaint about the nature of their § 1983 claims. From the section of the complaint style "factual allegations," we discern the following allegations. Plaintiffs complained that Harville's pre-riot complaints about prison conditions went without official response. They complained that Internal Affairs investigators coerced statements from them and used "irregular" witness statements. They complained about the TDCJ's termination of their employment, the TDCJ's refusal to expunge Harville's records completely, and the TDCJ's failure to rehire them after the Nickersons were acquitted

and the charges against Harville were dismissed. Plaintiffs also complained that prosecutors brought criminal charges against them "even though there was exculpatory evidence available" and that the prosecutors failed to turn this exculpatory evidence over to them.

Plaintiffs' claims about Harville's pre-riot complaints and the TDCJ's decision to fire them did not require a favorable termination in their criminal cases and, accordingly, accrued well before June 1996.[1] The district court did not err in holding that these claims were barred by the statute of limitations.

As to Plaintiffs' claims involving the investigators' tactics and the prosecutors' conduct during the criminal prosecution, these claims—if successful—would have implied the invalidity of the charges against Plaintiffs. These claims accrued at the time of the acquittals and dismissals. See Wells, 45 F.3d at 94-95 (malicious prosecution). Having reviewed the complaint, however, we conclude that Plaintiffs' claims against the investigators were wholly conclusional. We can find no factual support for the claims in the complaint; Plaintiffs merely asserted that coercion and "irregular" witness statements occurred. These bare, conclusion allegations are insufficient to support a § 1983 action. Macias v. Raul A. (Unknown), Badge No. 153, 23 F.3d 94, 99 (5th Cir. 1994).

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[1] For the first time on appeal, Plaintiffs argue in their reply brief that equitable tolling should be applied to their claims. However, we do not consider arguments made to us for the first time in a reply brief. Stephens v. C.I.T. Group/Equip. Fin., Inc., 955 F.2d 1023, 1026 (5th Cir. 1992).

Thus, the only viable malicious-prosecution claim is Plaintiffs' claim against the prosecutors themselves.

The remaining claims, that the TDCJ somehow violated Plaintiffs' constitutional rights by not re-employing them and by not fully expunging their employment records *after* the acquittals and dismissal, occurred within the two-year limitations period. These two claims were not barred by the limitations period.[2] However, the district court dismissed the TDCJ from the case on Eleventh Amendment grounds, and Plaintiffs do not challenge that conclusion on appeal. Thus, the district court committed no reversible error in dismissing these claims.

Boone and Montgomery argue that the dismissal of claims against them may be affirmed on the basis of absolute prosecutorial immunity. We conclude that the district court did not directly hold that the prosecutors were entitled to immunity.[3] "[A]n appellee generally may urge in support of a judgment any matter appearing in the record." Kiser v. Garrett, 67 F.3d 1166, 1169 (5th Cir. 1995). Plaintiffs addressed the prosecutors' arguments about prosecutorial immunity in the district court, and they have done so on appeal as

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[2] For this reason, we do not reach the Plaintiffs' argument that these two claims constituted continuing violations of their rights.

[3] Boone and Montgomery argue that Plaintiffs waived any arguments about immunity by not briefing the issue in their main brief. Because the district court's judgment was not premised on prosecutorial immunity, Plaintiffs were under no obligations to brief the issue.

well. Accordingly, we consider the prosecutors' arguments.

Prosecutors are entitled to absolute immunity for their decisions to initiate a criminal prosecution and for their actions during the course of a prosecution. See, e.g., Imbler v. Pachtman, 424 U.S. 409, 431 (1976). This disposes of Plaintiffs' arguments that Boone and Montgomeery may be liable for filing charges against them or for their failure to turn over exculpatory evidence. Id. at 431 & n.34. Plaintiffs argue that Boone, at least, lost his immunity by attesting to the credibility of an investigator when he signed the investigator's warrant for Harville's arrest. Even if Plaintiffs are correct that Boone would not be entitled to immunity for this activity cf. Kalina v. Fletcher, 118 S. Ct. 502, 509-10 (1997), their complaint contained *no* claims relating to Boone's signing of this affidavit. A prosecutor who lacks immunity for some actions does not lose his immunity for the more traditional prosecutorial functions he also performed. See, e.g., Burns v. Reed, 500 U.S. 478, 492-96 (1991). Boone and Montgomery are absolutely immune for the claims raised in Plaintiffs' complaint.[4] These § 1983 claims, like all the others, were properly dismissed by the district court.

Plaintiffs argue that the district court improperly dismissed their Racketeer Influenced and Corrupt Organizations Act (RICO) claim. To state

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[4] Some of the appellees argue that there is no federal claim for malicious prosecution. Because of our disposition of the malicious-prosecution claims, we do not reach this argument.

a civil RICO claim the plaintiff must allege "1) a person who engages in 2) a pattern of racketeering activity, 3) connected to the acquisition, establishment, conduct, or control of an enterprise." In re Burzynski, 989 F.2d 733, 741 (5th Cir. 1993) (internal quotations and citation omitted). To establish a "pattern of racketeering activity" a plaintiff must show "at least two predicate acts of racketeering that are related and amount to or pose a threat of continued criminal activity." Tel-Phonic Servs., Inc. v. TBS Int'l, Inc., 975 F.2d 1134, 1139-40 (5th Cir. 1992). The plaintiff must plead the elements of the criminal offenses that comprise the predicate acts. Elliott v. Foufas, 867 F.2d 877, 880 (5th Cir. 1989). Accordingly, Plaintiffs' complaint, which did not allege two acts of racketeering, is insufficient to state a RICO claim.

Plaintiffs argue that the district court erred in holding that they lacked standing to sue pursuant to the remedial decree in Ruiz v. Estelle[5], issued after constitutional infirmities were found in Texas's prison system. Violations of the Ruiz decree, without more, are not cognizable in a § 1983 action. Green v. McKaskle, 788 F.2d 1116, 1122-23 (5th Cir. 1986). To state a claim under § 1983, plaintiffs must allege that they have been injured by some constitutional violation of a defendant. Id. That did not occur here. There was no error in the district court's dismissal of Plaintiffs' Ruiz claim.

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[5] Ruiz v. Estelle, 503 F. Supp. 1265 (S.D. Tex. 1980), aff'd in part and vacated in part, 679 F.2d 1115, amended in part and vacated in part, 688 F.2d 266 (5th Cir. 1982).

Plaintiffs argue that the district court erred in dismissing their supplemental state-law claims with prejudice. They contend that because the district court declined to consider the state-law claims, it should have dismissed those claims without prejudice. This argument makes little sense, as it has no factual basis in the district court' opinion. Although the district court did not address Plaintiffs' state-law claims in a separate section of its opinion, it expressly held that it was dismissing (i) Plaintiffs' "civil conspiracy, fraud, invasion of privacy claims and a claim for intentional infliction of emotional distress" as barred by the two-year statute of limitations and (ii) their libel and slander claims as barred by a one-year statute of limitations. Plaintiffs have not argued that the district court erred in dismissing their state-law claims on limitations grounds. Accordingly, they have waived any such argument. Yohey v. Collins, 985 F.2d 222, 225 (5th Cir. 1993).

For the foregoing reasons, the district court's judgment is AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 9:98-CV-136

KEVIN AND ANGELA NICKERSON
and NEAL HARVILLE,
Plaintiffs-Appellants

vs.

STATE OF TEXAS, ET AL.,
Defendants-Appellees

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF TEXAS

BRIEF OF THE PLAINTIFFS-APPELLANTS

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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made so that the Judges at this Court may evaluate possible disqualification or recusal.

The parties to this case are:

Kevin Nickerson	Plaintiff-Appellant
Angela Nickerson	Plaintiff-Appellant
Neal Harville III	Plaintiff-Appellant
State of Texas	Defendant-Appellee
Texas Department of Criminal Justice (TDCJ)	Defendant-Appellee
Andy Collins, Executive Director, TDCJ	Defendant-Appellee
Wayne Scott, Director of Operations	Defendant-Appellee
James Keith Price, Senior Warden	Defendant-Appellee
Jerry Jackson, Assistant Warden	Defendant-Appellee

Latham Boone, Special Prosecutor	Defendant-Appellee
Ray Montgomery, Special Prosecutor	Defendant-Appellee
Captain Tom Davis, TDCJ Internal Affairs	Defendant-Appellee
Jerry Clements, TDCJ Internal Affairs	Defendant-Appellee
Debra Leonard, TDCJ Internal Affairs	Defendant-Appellee
Alan Polunsky, Chairman	Defendant-Appellee
John David Franz, member, Texas Board of Criminal Justice	Defendant-Appellee
Nancy Patton, member, Texas Board of Criminal Justice	Defendant-Appellee
Carole S. Young, member, Texas Board of Criminal Justice	Defendant-Appellee
Alfred Moran, member, Texas Board of Criminal Justice	Defendant-Appellee

Patricia Day, member,
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Carol S. Vance, member
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TDCJ — Defendant-Appellee

Counsel is unaware of any other person or entity with a financial interest in the outcome.

Counsel in this case are as follows:

Gary L. Bledsoe	Counsel for Appellants
Stephen Losch	Counsel for Appellants
Lisa A. Brown	Counsel for Appellees
Bruce R. Garcia	Counsel for Appellees

/s/
Gary L. Bledsoe

Attorney for Appellants

STATEMENT REGARDING ORAL ARGUMENT

Appellant requests oral argument in this case. This appeal involves complex issues of law and fact that will be enhanced by oral argument. Because of the importance and complexity of these issues, oral argument is warranted and requested.

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QUESTIONS PRESENTED FOR REVIEW

1. Did the district court err in dismissing the plaintiffs' federal-law and state-law claims for relief on the basis they were time-barred, when the plaintiffs' causes of action for their discharge and prosecution without probable cause did not accrue until they were acquitted and/or the charges against them dropped?
2. Did the district court abuse its discretion when, having dismissed the plaintiffs' federal claims which gave that court original jurisdiction, decided to dismiss the plaintiffs' pendent state-law claims with prejudice at the initial stages of the pleadings?

STATEMENT OF THE CASE

JURISDICTION

The U.S. District Court below had jurisdiction over this case pursuant to 28 U.S.C. §§ 1331, 1343, 2201, and 2202. This Court has jurisdiction of this appeal of the final order of a U.S. District Court pursuant to 28 U.S.C. § 1291.

STATEMENT OF FACTS

Plaintiffs, Kevin and Angela Nickerson and Neal Harville, are former employees of the Texas Department of Criminal Justice (hereinafter, TDCJ). On June 3, 1998 they filed an action in the

United States District Court for the Eastern District of Texas, seeking declaratory and equitable relief, and compensatory and punitive damages against the defendants. (Complaint, p. 4) Kevin and Angela Nickerson and Neal Harville all worked as guards at the Texas Department of Criminal Justice, a State of Texas agency responsible for housing inmates and convicted felons. (Complaint, p. 2) Before their termination and prosecution by TDCJ, the plaintiffs worked diligently for the Department, were in good standing, and received positive evaluations from their supervisors. (Complaint, pp. 5-6)

On numerous occasions, however, the Nickersons and Harville raised concerns to their supervisors regarding health and safety problems in the Terrell Unit where they worked. Their concern was that lax enforcement of departmental rules as well as inadequate supervisory scrutiny created health and safety risks to inmates and employees alike. More specifically, Harville had reported to his supervisors that: broken or unlockable doors between the chow hall and kitchen area resulted in uncontrollable and otherwise prohibited traffic of inmates between the two areas; inmates have access to computers, offices and telephones, also in violation of departmental rules; sexual relations existed between several correctional officers and inmates; several incidents in which inmates assaulted correctional officers remained unreported. Finally, Harville also brought to his supervisors' attention that inmates who should have been housed in administrative segregation were instead placed in low-security

areas, jeopardizing the life and safety of other inmates as well as staff and visitors. (Complaint, p. 3)

Harville's numerous complaints went unheeded by the Department, and violence in the Terrell Unit went uninhibited. This situation lead to several incidents of assault against correctional officers, culminating in the October 7, 1994 riot involving 250 inmates in which several officers incurred physical injuries. (Complaint, p. 3) In another incident, a security officer, about whose propensity to use excessive force against inmates Harville had repeatedly warned the Department, was involved in a struggle with an inmate that ended with the inmate's death. (Complaint, p. 3)

In the midst of this highly volatile and violent environment, TDCJ decided to apply punitive measures against the plaintiffs instead of addressing the fundamental problems in the prison. Thus, when after the October 7 riot an incident between Angela Nickerson and an inmate took place, the Internal Affairs Division of TDCJ launched a full-fledged 'investigation' and brought criminal charges against Angela, her husband, then a high-ranking, "Sergeant" security officer, and Harville, even though the inmate suffered no serious injury whatsoever. (Complaint, p. 6) The incident ensued when Robinson, an inmate, threw either spit or urine on Angela and she requested the officer in charge to 'handle the situation' with Robinson. Receiving no response from the officer in charge, Angela resorted to her husband for help. Subsequently,.Angela, her husband, Harville, and two other officers went into

Robinson's cell and attempted to remove him, whereupon a struggle ensued and Robinson suffered minor scratches in the process. (Complaint, p. 2) It is uncontroverted that none of the four officers involved in the struggle with Robinson used excessive force. Nonetheless, Robinson was taken to the hospital and treated immediately, whereupon Internal Affairs launched its 'investigation.' (Complaint, p. 6)

Internal Affairs' energetic pursuit of charges against the Nickersons and Neal Harville--who, remarkably, was not even in the cell when the struggle with Robinson took place (Complaint, pp. 6-7)--stands in sharp contrast to its slothful treatment of other, far more outrageous conduct and security problems in the Unit. In fact, in a different incident, when an inmate was beaten to death by a security officer and dragged down the stairs with his head bumping every step on the way, no investigation was conducted and no dismissal of duties imposed upon said officer. TDCJ did not even bother taking the inmate to the hospital. (Complaint, p. 6)

The fact that Internal Affairs was engaged in a malicious and retributive witch hunt is evinced by its withholding of exculpatory evidence from plaintiffs' counsel. Both TDCJ and the prosecution proceeded in their charges against plaintiffs in spite of their awareness of evidence clearing the plaintiffs of wrongdoing. (Complaint, p. 7) On June 3, 1996 both Angela and Kevin Nickerson were acquitted of all charges in a jury trial; a few days later, on June 11, TDCJ dropped all charges against Harville. To date, the Nickersons have

not been reinstated and Harville's record has not been full expunged by TDCJ.

As a response to their unjustifiable discharge, sham investigation and prosecution, the plaintiffs brought an action in the United States District Court for the Eastern District of Texas, Lufkin Division, seeking equitable and compensatory relief. They asserted violations of their civil rights under §§ 1983 and 1985, civil conspiracy, fraud, invasion of privacy, intentional infliction of emotional distress, and slander and libel.

STANDARD OF REVIEW

The standard for review of the district court's dismissal for failure to state a claim upon which relief can be granted is *de novo. (Capital Parks, Inc. v. Southeastern Advertising and Sales Sys., Inc.,* 30 F.3d 627, 629 (5th Cir. 1994))

ELEMENTS OF CAUSES OF ACTION

The original complaint alleged eight different causes of action. The following is a list of these causes and their constitutive elements.

1- 42 U.S.C. Section 1983: this section creates a cause of action against any person who, "under color of any statute, ordinance...of any State...subjects, or causes to be subjected, any citizen of the United States...to the deprivation of any rights, privileges or immunities secured by the Constitution and laws...." (42 USCA § 1983) In this case, the defendants were acting under color of

State law and their conduct deprived the plaintiffs of their federal rights. These rights include being free of malicious prosecution, official oppression, the invasion of their privacy, the use of slander and libel against them, wrongful discharge, unreasonable searches and seizures, false arrest, the denial of freedom of expression, due process of and equal protection under the law, and fraud, all of which are encompassed in this suit.

2- 42 U.S.C. Section 1985: this section creates a cause of action when "two or more persons conspire for the purposes of.impeding, hindering, obstructing, or defeating, in any manner, the due course of justice...with intent to deny to any citizen the equal protection of the laws...." (42 USC § 1985) In this case, the defendants conspired to conceal exculpatory evidence, manipulate witnesses, initiate a fraudulent prosecution of the plaintiffs, in violation of their right for equal protection under the law.

3- 42 U.S.C.A. Section 1988(b): this section dictates that in an action or proceeding to enforce the provisions of Sections 1983 or 1985, "the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs...." (USC § 1988(b)) As alleged in sections 1 and 2 above, this case is brought to vindicate the civil rights of the

plaintiffs under Sections 1983 and 1985, and the plaintiffs should be entitled to recover their attorney's fees if plaintiffs prevail.

4- Civil RICO: the statute prohibits racketeering activity when various unlawful actions involve wire or mail fraud, impede interstate commerce, and further corrupt organizations. A RICO claim, 18 U.S.C. 1962(c), "requires (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479 (1985)) Since the plaintiffs contend that defendants' conduct was willful and intentional, plaintiffs seek punitive damages in order to deter such treatment of the plaintiffs and others in the future.

5- Intentional infliction of Emotional Harm: as a consequence of defendants' actions the plaintiffs have suffered and continue to suffer emotional distress.

6- Invasion of Privacy: the defendants have caused unnecessary and unwarranted invasion of the plaintiffs' private lives, one that would be highly offensive to a. reasonable person.

7- Fraud: it is the contention of the plaintiffs that defendants, except the Board Members, knowingly made material representa-

tions that were false, or that those representations were made with utter disregard to their truth, and with the intention that these representations be acted upon. Actions taken as a consequence of these misrepresentations were the proximate cause of the harm suffered by the plaintiffs.

8- Slander and Libel: the plaintiffs suffer continuing harm to their reputation, and social as well as institutional standing, as a consequence of defendants' slanderous and libelous statements. The Fifth and Fourteenth Amendments protect the plaintiffs' interest in their liberty, names and reputation, all of which have suffered irreparable harm due to their charge, dismissal and prosecution by defendants.

ARGUMENT SUMMARY

The district court's decision to dismiss the plaintiffs' federal and state law claims with prejudice on the basis that they were time-barred ignores the crucial notion that in a claim of malicious prosecution the plaintiff has no cause of action unless and until the conviction against him is overturned, or the charges dropped. *(Heck v. Humphrey)* Similarly, the court's decision to dismiss the claims ignores the defendants' continuing violations of plaintiffs' rights, by refusing to rehire the Nickersons and to fight full expunction of Harville's records once the charges against him were dropped. In dismissing the plaintiffs' Com-

plaint, the district court unjustifiably assumed that none of the facts pleaded or could be pleaded would bring their claims within the statutory period, hence going against the settled practice that for purposes of motion 12(b)(6) the plaintiffs' allegations are construed in the light most favorable to the plaintiffs. *(Sheuer v. Rhodes)* Likewise, once the federal district court decided to dismiss the plaintiffs' federal claims, which gave that court original jurisdiction, it lacked the authority to dismiss the remaining pendent state claims *with prejudice. (Carnegie-Mellon University v. Cohill; McLearn v. Cowen & Co.)* A primacy purpose behind the doctrine of pendent jurisdiction is recognition of the principle of judicial economy. Since the district court decided to dismiss the case in its initial phase, there was no investment of resources or treatment of factual issues that would be replicated by bringing the case before a State court. Finally, the plaintiffs have standing under *Ruiz v. Estelle* to sue TDCJ when negligence by TDCJ in maintaining an adequately healthy and safe prison environment created the circumstances that facilitated the plaintiffs' termination and prosecution by the defendants.

ARGUMENT

I. Statute of Limitations Was Not an Issue in this Case Because Plaintiffs Did Not Have a Cause of Action Before Acquittal and Dismissal of Charges against Them

In less than one and one half pages, the district court dismissed all of the above causes of action on the face of the pleadings, declaring, that "for all of them, the statute of limitation (2 years) has run." (The District Court's Memorandum, p. 4) The district court based its dismissal of plaintiffs' civil rights and tort claims on the erroneous assumption that the statute of limitations for plaintiffs' claims of discharge and prosecution accrued in 1994. Citing *Piotrowski v. City of Houston* and other cases, the court went on to state that even though Congress did not provide a statute of limitations for § 1983 cases, federal courts would usually apply the forum state's general personal injury limitations period. (Memorandum, p. 4) Hence, under *Drayden v. Needville Independent School Distr.*, stated the district court, the two-year Texas statute of limitations period would extend to civil rights claims (Tex. Civ. Prac. & Rem. Code, § 16.003 (a)), while a one-year statute of limitations applies to plaintiffs' libel and slander claims (Tex. Civ. Prac. & Rem. Code, § 16.002). (Motion to Dismiss, 4)

However, it is important to note at the outset that the plaintiffs never contested that the forum state's statute of limitation would apply to their claims, *if in fact they accrued back in 1994.*

Rather, the plaintiffs repeatedly asserted in their Complaint (p. 4, p. 7) and Motion for New Trial or to Reconsider Motion to Dismiss that the plaintiffs' causes of action against TDCJ "did not accrue" until plaintiffs "were acquitted or the cases dismissed." (Motion for Reconsideration, 252) Therefore, at the heart of plaintiffs' case is the well-established maxim that the statute of limitations in a malicious prosecution case is not an issue, simply because the plaintiff "has no cause of action under § 1983 unless and until the conviction or sentence is revered, expunged, invalidated, or impugned by the grant of a writ of habeas corpus." *(Heck v. Humphrey,* 512 U.S. 477, 489 (1994))

In *Heck v.* Humphrey, the Supreme Court stated that "one element that must be alleged and proved in a malicious prosecution action is termination of the prior criminal proceeding in favor of the accused." (*Heck v. Humphrey,* 512 U.S., at 484) The Court's policy rationale here is self-evident, but it bears repeating in the present context. Allowing a charged or convicted criminal to assert a claim of malicious prosecution against his accuser creates the problem of parallel litigation "'over the issues of probable cause and guilt,"' and gives rise to the possibility of conflicting adjudications in cases where a defendant is convicted of the underlying criminal offense but nevertheless prevails in his tort litigation. (Id.) Furthermore, permitting a collateral attack on a conviction that has not been overturned or invalidated contravenes the objectives underlying the criminal justice system via the use of the civil jus-

tice system, and destabilizes finality and closure. (Id. at 484-85) All of these factors combine to establish a strong prohibition on proceeding with a claim of malicious prosecution before acquittal of the plaintiff.

Therefore, since a once-defendant, like the Nickersons, is prohibited from asserting tort claims while his conviction remains valid, he simply has no cause of action arising in that set of circumstances. Utilizing this line of reasoning, the Court concluded in *Heck* that it "was unnecessary for us to address the statute of limitations issue...."(Id. at 489) The Court reasoned the statute of limitations posed no difficulty, "since the § 1983 claim has not yet arisen.:... [A] cause of action for malicious prosecution does not accrue until the criminal proceedings have terminated in the plaintiff's favor." (Id. at 489)

In light of *Heck*, the Nickersons' and Harville's causes of action against the defendants, who deprived them of their employment and liberty and inflicted reputational harm upon them by marring their institutional standing with false charges, investigation and prosecution, did not arise until they were acquitted of the ill-doing TDCJ wrought upon them. In other words, the Nickerson's could not have simply asserted violations of their civil rights, conspiracy, infliction of emotional harm, violation of their rights of privacy, fraud and so forth, had the trial culminated in their conviction. Likewise, Harville could not have sued under like circumstance before TDCH decided to drop all charges against him.

II. Plaintiffs Asserted Causes of Action Based on Defendants' Refusal to Rehire Them and Clear their Rccords, Both of Which Are Continuing Harms

Moreover, the district court's decision to dismiss the claims because they were time-barred ignores the defendants' continuing violations of the plaintiffs' rights, by refusing to rehire the acquitted Nickersons and to fight full expunction of Harville's records once the charges brought against him were no longer viable. Equally important, TDCJ did not cease its disparagement of the plaintiffs' reputation after they were cleared of wrong-doing. In fact, slanderous remarks made by the Department, and disseminated in that tightly-knit community, rendered it very difficult for the plaintiffs to go beyond their past prosecution by the TDCJ, find new employment, and start afresh. It is remarkable that when granting the defendants' 12(b)(6) motion to dismiss, the district court assumed without argument that none of the facts pleaded or could be pleaded in the plaintiffs' Complaint could bring the matter into the statutory period under the law. Yet, it is uncontested that for purposes of motion 12(b)(6), the complaint is construed in the *light most favorable to the plaintiff.* (*Sheuer v. Rhodes,* 416 U.S. 232 (1974); *Miller v. Stanmore,* 636 F.2d 986 (5th Cir. 1981)) Indeed, a 12(b)(6) dismissal is likely to be granted only when there are allegations showing on the face of the pleadings that there is an "insuperable bar to relief." (Wright & Miller, Federal Practice and Procedure: Civil 2d § 1357; see also

U.S. v. Uvalde Consol. Independent School Distr., 625 F.2d 547 549 n.1 (5th Cir. 1980) citing Wright and Miller).

Therefore, the district court erred when it dismissed plaintiffs' claims based on time limitations. While a complaint may be dismissed in a 12(b)(6) motion when an affirmative defense exists, that defense must appear on the face of the pleadings. (Wright & Miller, Federal Practice and Procedure: Civil 2d § 1357, at 348; see also *Herron v. Herron*, 255 F.2d 539 (5th Cir. 1958) stating that a defense of limitations or lashes may be asserted by a 12(b)(6) motion, provided the complaint "shows affirmatively" that the claim is barred). In this case, by contrast, the plaintiffs' allegations indicate a claim for malicious prosecution, a cause of action that did not accrue until the plaintiffs were acquitted. Hence, for their discharge and prosecution the statute of limitations began to run on June 3, and June 11, 1996, when the Nickersons were acquitted and charges against Harville dismissed, respectively.

Prevailing case law supports the plaintiffs' contention that the district court erred in dismissing the case because the statute of limitations had run out. Here, the defendants can only facilely assert that the wrongdoing concluded with the acquittal of the plaintiffs, on June 3, 1996. Yet, the plaintiffs filed their complaint on June 3, 1998, within the two-year statute of limitations. In truth, the defendants' harm is continuing 1) through their refusal to rehire the plaintiffs and 2) based on their new and different incidents of disparagement of and slander against the plaintiffs.

These facts render any discussion of a statute of limitations moot.

III. Plaintiffs Retain Their Civil Rights Claims Under the Fourteenth Amendment in Light of *Albright v. Oliver*

Decided in 1994, *Albright v. Oliver* sheds some doubt as to whether civil rights claims brought by a plaintiff who allegedly suffered prosecution and arrest without probable cause should be decided under the Fourth or the Fourteenth Amendment. (510 U.S. 266 (1994) In that case, four Justices came to the conclusion that the plaintiff's right to be free from prosecution without probable cause should be vindicated by the Fourth, rather than the Fourteenth, Amendment, and that the substantive Due Process Clause of the Fourteenth Amendment did not afford such a plaintiff a remedy. (51) U.S., at 266)

It is unclear what the *Albright* legacy will be, but support in the lower courts for a Section 1983 action anchored in the Fourteenth Amendment substantive Due Process jurisprudence is abundant. In *Brothers v. Klevenhagen,* for instance, this Court dealt with whether the use of excessive police force against a pretrial detainee gave rise to constitutional protection questions under the Fourteenth Amendment. *(Brothers v. Klevenhagen,* 28 F.3d 452 (5th Cir. 1994) (Stewart, C.J., dissenting)) Although in Footnote 3 this Court drew a meaningful distinction between a pretrial detainee escaping from custody and a plaintiff challenging his arrest and prosecution without prob-

able cause, the Court went on to note that the conclusion in *Albright* suggesting "that the Fourth Amendment applies to pretrial deprivations of liberty did not receive the support of the majority of the Justices." (Brothers v. Klevenhagen, 28 F.3d, at 457) The Court's reading of this issue in *Brothers* is echoed in the Fourth Circuit opinion in *Jean v. Collins.* (107 F.3d 1111 (4th Cir. 1996), *cert. granted, judgment vacated on other grounds,* --- S.Ct. ---, No. 98-980, 1999 WL 342398)) In that case, the Fourth Circuit disagreed with the proposition that claims of pretrial deprivations, withholding of exculpatory evidence and obtaining witness statement by irregular methods should be treated under the Fourth Amendment rather than the Fourteenth Amendment. The Fourth Circuit held that *Albright* did not preclude causes of action based on malicious prosecution find withholding of exculpatory evidence from being grounded in the Fourteenth Amendment. *(Jean v. Collins,* 107 F.3d, at 1115) Indeed, in the present case, the plaintiffs' civil rights claims may be raises equally strongly under the "Equal Protection" Clause of the Fourteenth Amendment, as well as under the more procedural protection afforded plaintiffs under the Fourth Amendment.

IV. In Dismissing Plaintiffs' Case, the District Court Converted Motion 12(b)(6) to Motion 56 for Summary Judgment

Just as the district court failed to construe plaintiffs' civil rights claims under Sections 1983, 1985 and 1988 in the light most favorable to the

plaintiffs, hence going against doctrine and practice, so too it dismissed plaintiffs' RICO claims based on plaintiffs' alleged failure to meet the RICO pleading requirements. Here, too, as with the civil rights claims, the court engaged the merits of plaintiffs' claims, evaluating the underlying legal sufficiency of the charges rather than their formal sufficiency. (Wright & Miller, Federal Practice and Procedure: Civil 2d § 1356) Hence, the entire thrust of the court's dismissal of these claims is two-fold. First, according to the court, the plaintiffs "describe one potential offence, namely failure to produce exculpatory evidence pursuant to an alleged court order, but do not describe two offenses," and so fall short of the RICO requirements. (Court Memorandum, 5) Second, the plaintiffs fail to show that defendants" racketeering constitutes a "threat of continued criminal activity." (Id.) Even assuming the Court's inquiry into the legal merits of the facts alleged is warranted, which it is not, meeting the district court's two-fold requirement is not an insuperable task, when the pleadings are read, as they should, in the light most favorable to the plaintiffs. *(Sheuer v. Rhodes,* 416 U.S. 232 (1974)) We will address each part of the test respectively.

First, under the facts alleged in the Complaint, other forms of conduct went hand in hand with the defendants' conspiracy to frame the plaintiffs by withholding exculpatory evidence. Launching a fraudulent investigation, in which witness statements were "highly irregular" and were later contradicted at trial by these same witnesses, was another predicate offense clearly stated in the

Complaint (7) and re-articulated in the plaintiffs' Motion to Reconsider. (253) So, too, was the filing of criminal charges against the plaintiffs another crucial episode in an ongoing plot to frame the plaintiffs whose pronounced displeasure with and criticism of TDCJ management earned them the Department's animosity. Plaintiffs also brought up in their Motion to Reconsider the possible use of mail or wire fraud for payments or even for forwarding litigation documents. (253) These acts more than fulfill RICO's requirement that there be more than one predicate offense in order for the plaintiffs to allege a conspiracy.

Second, the court it its Memorandum in support of its Order to Dismiss the case cited plaintiffs' failure to show that plaintiffs' racketeering constituted a threat of continued criminal activity." (5-6) The district court relied on *Manax v. McNamara,* among others, a Fifth Circuit case in which this Court held that an association allegedly formed for one short-term goal, lacks the continuity of a criminal enterprise required under RICO. *(Manax v. McNamara,* 842 F.2d 808, 811 (5th Cir. 1988))

Manax, however, involved allegations by the plaintiff, a medical doctor, that defendants--an attorney and another medical doctor--had formed an association whose objective was to destroy his practice in retaliation for plaintiff having attempted to remove the doctor from the hospital staff. (Id. at 810) As this Court observed in *Manax,* the plaintiff there did not allege an ongoing "association-in-fact"' between the defendants, but rather an association that had "one

short-term goal--the destruction of Manax's medical practice and will presumably disband after the attainment of that goal." (Id. at 811) The present case is readily distinguishable. Internal Affairs, which launched the fraudulent internal investigation before charges were brought, is an integral part of, and worked in association with TDCJ to investigate, bring charges against, discharge, and ultimately prosecute, the plaintiffs. In other words, it was TDCJ and its agents and employees, the plaintiffs contend, who ordered the above predicate offenses against them. If this is not "'an ongoing organization [that] function[s] as a continuing unit'" *(Atkinson v. Anadarko Bank and Trust Co.,* 808 F.2d 438, 440 (5th Cir. 1987) quoting *U.S. v. Turkette,* 452 U.S. 576 (1981))--one that clearly poses a risk of further racketeering activity--then it is hard to see what is.

Clearly, the plaintiffs have fulfilled the district court's own two-prong test for alleging civil conspiracy against them. Had the plaintiffs been given the opportunity to articulate their case more fully and develop the record before the district court, they would have been able to prove the merit of this and other claims. Instead, the district court threw out plaintiffs' claims, judging them on the basis of their legal 'insufficiency' while simultaneously preventing the plaintiffs from advancing a detailed legal argument of their claims in full. In effect, the court treated defendants' 12(b)(6) motion to dismiss as a 56 motion for summary judgment. This conversion, however, necessitates that the court give both parties "'the same notice and opportunity to respond as

provided in Rule 56." *(Lucero v. Gunter* (52 F.3d 874, 877 (10th Cir. 1995); *Herron v. Herron,* 255 F.2d 589 (5th Cir. 1958))

V. Plaintiffs--as Prison Guards--Have Standing to Sue under *Ruiz.* Because They Were Criminally Implicated in the Incidents That Resulted from TDCJ's Bad Management of Prison Conditions.

The district court rejected plaintiffs' claims that inadequate supervision of security and health regulations at TDCJ violated *Ruiz v. Estelle.* (503 F. Supp. 1265 (S. D. Tex. 1981), stay denied in part, aff'd in part, 650 F.2d 555, and 666 F.2d 854, aff'd in part, denied in part 688 F.2d 266, cert. denied 103 S. Ct. 1438) The court reasoned that the plaintiffs in the present case lacked standing to sue TDCJ under *Ruiz.* (Memorandum, p. 7) To be sure, *Ruiz* was brought by inmates complaining that the conditions of their confinement were unconstitutional. (*Ruiz v. Estelle,* 503 F. Supp. 1265) Likewise, the court's emphasis in *Ruiz* was on the necessity to remedy prison conditions that unconstitutionally impacted prison inmates. (Id.)

However, an equally valid, if less pronounced, aspect of *Ruiz* is the overall adverse effect that poor health and safety conditions have on the effectiveness and safety of prison guards in the performance of their jobs. Hence, lax security measures and lack of adequate supervision or violent inmates due primarily to the poor inmate-uniformed guard ratio, among other things, made

it difficult for the guards in that case to safely scrutinize and control violent inmates. (Id. at 1292) These conditions resulted in uncontrolled prison circumstances in which the prison wardens failed to discover and/or stop incidents of torture and sexual assault that went on in prison cells. (Id. at 1293) In *Ruiz*, the prison administration concluded that prison guards were not at fault, and no disciplinary action was taken against any of them. (Id.) In the present case, by contrast, prison authorities did blame the plaintiffs for misconduct that resulted from general prison conditions that were beyond the plaintiffs' control but in the control of the management. The October, 1994 prison riot--which gave rise to the incident between the plaintiffs, and inmate Robinson, thus prompting the sham investigation and prosecution--was a direct result of the negligent management of prison conditions. In this sense, the plaintiffs—as prison guards--have standing to sue under *Ruiz* because they were criminally implicated in the incident that resulted from TDCJ's negligent management of prison conditions. At another level, the defendants' continuing defiance of *Ruiz's* input adds another episode to their conspiracy and violation of RICO.

VI. The District Court Lacked Authority to Dismiss Plaintiffs' State-Law Claims with Prejudice under the Doctrine of Pendent Jurisdiction

In addition to asserting civil rights and RICO claims under federal law, the plaintiffs listed the

following violations of their rights under state law: intentional infliction of emotional distress, invasion of privacy, fraud, slander and libel. In broad stokes, the district court announced that all of plaintiffs' claims, federal as well as state, were to be dismissed with prejudice. If permitted to stand, the court's order would prevent the plaintiffs from bringing their state-law claims in a state court ever, *even though the district court had original jurisdiction only over plaintiffs' federal claims, not their claims arising under state law.*. (28 USC § 1367) The district court's order to dismiss with prejudice violates the most rudimentary notions of justice and is inconsistent with established doctrine and case law. Existing case law does not support a federal court which, deciding to dismiss plaintiffs' federal claims, issues an order dismissing *state-law* claims at the initial stages of pleadings *with prejudice. (McLearn v. Cowen & Co.,* 660 F.2d 845 (2nd Cir. 1981) (Meskill, C.J., dissenting) holding that the district court had no jurisdiction to dispose of pendent claims on the merits once it dismissed federal claims prior to trial). This is because, under the established case law, a federal court dismissing federal claims has to consider and weigh the balance of "judicial economy," "convenience," "fairness to the litigants," and "comity" when dismissing state-law claims under the doctrine of pendent jurisdiction, *(Mine Workers v. Gibbs,* 383 U.S. 715 (1966))

Mine Workers v. Gibbs epitomizes modern understanding of pendent jurisdiction. In that case, the Supreme Court recognized that the interests of judicial economy warranted broadening federal

courts' jurisdiction to encompass state-law claims brought in conjunction with federal-law claims when both sets of claims arose from "a common nucleus of operative fact." *(Mine Workers v. Gibbs,* 383 U.S., at 725) Hence, when state-law claims arise from the same nucleus of operative fact as federal claims, it is in the interest of convenience and the economy of adjudication and cost to allow the same court to decide both sets of claims simultaneously. (Id.) Likewise, when federal claims') which give rise to a federal court's original jurisdiction, have been dismissed or dropped from the complaint, that federal court has been vested with discretion under 28 USC § 1367(c)(3) to decline asserting supplemental jurisdiction over state-law claims.

To be sure, many district courts, having decided to dismiss the claims over which they have original jurisdiction, either choose to retain jurisdiction over state-law claims, remand to state court, or dismiss state-law claims *without prejudice.* (See, for e.g., *Doe v. City of Chicago,* 883 F. Supp. 1126 (D. C. Ill. 1994) holding that the federal district court has discretion to retain jurisdiction over state claims since they did not present novel and complex issues of state *law; Carnegie-Melon University v. Cohill,* 648 F. Supp. 1318, *aff'd,* 484 U.S. 343 (1988) dismissing federal-law claims, and remanding remaining claims to state court; *Eres v. County of Alameda,* 1999 WL 66519, at *13 (N. D. Cal. 1999) granting defendants' motion for summary judgment on plaintiffs' federal claims and state claims and dismissing without prejudice).

Moreover, Gibbs speaks to more than interest in judicial economy. Other paramount concerns in that case are fairness to the litigants, convenience and comity. These interests, the *Gibbs* Court emphasized, might warrant against exercising federal jurisdiction over claims arising under state law. Hence, *Gibbs'* emphasis that "pendent jurisdiction is a doctrine of discretion, not of plaintiff's right." *(Mine Workers v. Gibbs,* 383 U.S., at 726) More recently, in *Carnegie-Mellon University v. Cohill,* the Supreme Court reiterated *Gibbs'* admonition that "in each case and at every step of the litigation, the values of judicial economy, convenience, fairness and comity" should be weighed. Therefore, "[w]hen the balance of these factors indicates that a case properly belongs in state court, as when the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain,...the federal court should decline the exercise of jurisdiction *by dismissing the case without prejudice. (Carnegie-Melon University v. Cohill,* 484 U.S. 343 (1988) emphasis added).

In this case, the district court dismissed all of plaintiffs' claims, federal as well as state, on the pleadings, well in advance of trial. It did so by granting the defendants their motion to dismiss under Rule 12(b)(6). Yet, a primary practical consideration in pendent jurisdiction, as argued above, is recognition of the principle of judicial economy and the need to "avoid a retrial of the factual issues that are necessarily involved in the trial of the same operative facts." (*McLearn v. Cowen & Co.,* 660 F.2d, at 848) Since the district

Court decided to dismiss the case in the initial phase, there was no investment of judicial resources, or treatment of factual issues that would be replicated by bringing the case before a sate court.

Moreover, in its treatment of plaintiffs' state claims, the court failed to consider that the statute of limitations may be tolled in cases that involve fraud, hence permitting the assertion of these claims in state Courts. Nor did the court entertain the crucial issue that the infliction of emotional and reputational harm is an on-going violation of plaintiffs' rights, one that did not stop in 1994. Finally, the district court should have considered the interests the State might have in deciding issues that arise under its own laws. In light of the above discussion, it is clear that the district court exceeded its authority and went beyond the mandate given to district courts by *Gibbs* when it dismissed plaintiffs' state rights with prejudice.

CONCLUSION

Given the above, the district court's dismissal of plaintiffs' case should be reversed and the case should be remanded.

Respectfully Submitted,

/s/

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above has been served by placing the same in the United States Mail on the 16th day of June, 1999 to the following counsel of record:

Bruce R. Garcia
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Lisa A. Brown
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/s/
Gary L. Bledsoe

APPENDIX C

FILED
U.S. DISTRICT COURT
EASTERN DISTRICT OF TEXAS
JUN 3 1998
DAVID J. MALAND, CLERK
BY
DEPUTY CAROLYN KELLEY

9:98cv 136

JURY DEMAND
JUDGE COBB

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

KEVIN AND ANGELA NICKERSON,	§
and NEAL HARVILLE,	§
Plaintiffs	§
vs.	§
	§
STATE OF TEXAS, TEXAS	§
DEPARTMENT OF CRIMINAL	§
JUSTICE, ANDY COLLINS,	§
EXECUTIVE DIRECTOR, in his	§
official capacity, WAYNE SCOTT,	§
DIRECTOR OF OPERATIONS, in	§
his personal and official capacities,	§
JAMES KEITH PRICE, SENIOR	§
WARDEN, in his personal and	§
official capacities, JERRY	§

JACKSON, ASSISTANT WARDEN,	§
in his personal and official	§
capacities, LATHAM BOONE and	§
RAY MONTGOMERY, special	§
prosecutors, Captain Tom Davis,	§
JERRY CLEMENTS AND DEBRA	§
LEONARD, employees of the Texas	§
Department of Criminal Justice	§
Internal Affairs Division, ALAN	§
POLUNSKY, Chairman and JOHN	§
DAVID FRANZ, NANCY PATTON,	§
CAROLE S. YOUNG, ALFRED	§
MORAN, PATRICIA DAY,	§
LAWRENCE FRANCIS, A.M.	§
STRINGFELLOW, members of the	§
Texas Board of Criminal Justice,	§
and CAROL S. VANCE, member	§
and former Chairperson Texas	§
Department of Criminal Justice,	§
in their official capacities, and	§
Unknown Agents or Employees of	§
the Texas Department of Criminal	§
Justice,	§
Defendants	§

ORIGINAL COMPLAINT

COMES NOW Plaintiffs, Angela and Kevin Nickerson, and Neal Harville who file this their Original Complaint against Defendants the STATE OF TEXAS, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, ANDY COLLINS EXECUTIVE DIRECTOR, in his official capacity, WAYNE SCOTT, DIRECTOR OF OPERATIONS, in his per-

sonal and official capacities, JAMES KEITH PRICE, SENIOR WARDEN, in his personal and official capacities, JERRY JACKSON, ASSISTANT WARDEN, in his personal and official capacities, LATHAM BOONE and RAY MONTGOMERY, special prosecutors, Captain Tom Davis, JERRY CLEMENTS AND DEBRA LEONARD, employees of the Texas Department of Criminal Justice Internal Affairs Division, ALAN POLUNKSY, Chairman and JOHN DAVID FRANZ, NANCY PATTON, CAROLE S. YOUNG, ALFRED MORAN, PATRICIA DAY. LAWRENCE FRANCIS, A.M. STRINGFELLOW, members of the Texas Board of Criminal Justice, and CAROL S. VANCE, member and former Chairperson Texas Department of Criminal Justice, in their official capacities, and various UNKNOWN AGENTS OR EMPLOYEES OF THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE. Plaintiffs are seeking damage and equitable relief for injuries and damages caused by the Defendants deprivation of their rights protected by the Constitution of laws of the United States and the State of Texas. In this lawsuit plaintiffs are seeking compensatory and punitive damages from this Court for injuries wrongfully inflicted upon them by the Defendants. They are also seeking equitable relief, including back pay and reinstatement. In support thereof, Plaintiffs will respectfully show the Court:

Nature of the Case

The Texas Department of Criminal Justice is an Agency of the State of Texas with responsibility

for housing inmates who have violated various felony criminal laws of Texas. Plaintiff Harville had on numerous occasions raised issues with his superiors regarding various violations of law or policy. These matters included, but are not limited to the following: (a) a door that would not lock separating the chow hall from the kitchen, (b0 the serving line door to the chow hall was not secured as required to control the flow of inmates into the area; (c) specific officers providing utensils to inmates: (d) kitchen workers not wearing protective gloves, hats or hair nets when working in the serving line. And in fact, he had brought to their attention that one of the guards at the Terrell Unit of TDC was so deficient in doing his job that serious injury or death could occur unless something was done to take action to change the course of action: (e) correctional officers having sexual relations with inmates and (f) inmates having improper access to computers, offices and telephones. No actions were taken to address the concerns raised by Harville. And to complicate matters, inmates who should have been housed in administrative segregation were brought in and placed in areas without proper security, jeopardizing the life and safety of other inmates as well as staff and authorized visitors. The incidents of inmate assaults against correction officers were so numerous that many went unreported. However, no actions still were taken to curb this problem. This inappropriate placement action contributed to events that occurred on or about October 7th, 1994 which caused injury to correctional officers. However, instead of addressing the prob-

lem caused by the inadequate security and placement in the facility, the Agency used the incident as an opportunity to eliminate correctional officers who opposed the unsafe conditions at the facility. Ironically, at the same time that the incident occurred regarding the plaintiffs, the security officer about whom the Agency had been warned, was involved in an incident with another inmate which ended in the death of the inmate. These matters were clearly raised questions as to TDCJ's compliance with the directives of **Ruiz v. Estelle**. As a result of the incident that the plaintiffs were involved in, no inmate was seriously harmed in any way. The only person who might have been harmed seriously was plaintiff Angela Nickerson. However, as a result of the incident a fraudulent investigation was conducted by the Internal Affairs Division of the Texas Department of Criminal Justice, and the Agency and its agents and employees caused criminal charges to be brought against the Plaintiffs. The criminal charges continued even though exculpatory information was in the possession of the Defendants and apparently turned over to the prosecuting attorneys. The Nickerson were acquitted of all charges on or about June 3, 1996, and charges were dismissed against Harville on or about June 11, 1996. Plaintiffs now bring this action for (1) violation of their Civil Rights under (and also retaliation) 42 USC Section 1983, 1985 and 1988; (2) civil conspiracy; (3) civil RICO, fraud, (4) liberty interest (5) noncompliance with Ruiz v. Estelle and (6) equitable relief.

Parties

1. Plaintiffs, Kevin and Angela Nickerson, are adult individuals who reside in Bowie County, Texas and who may be served with process in this litigation at the officer of their attorney of record, Gary L. Bledsoe.

2. Plaintiff Neal Harville is an adult resident of Nacogdoches County, Texas, and may be served with process in this litigation at the office of his attorney of record, Gary L. Bledsoe.

3. Defendants State of Texas and Texas Department of Criminal Justice are governmental entities created under the laws of the United States and the State of Texas.

4. Defendants Wayne Scott, James Keith Price, Jerry Jackson, Jerry Clements, Andy Collins in his official capacity and Debra Leonard are employees of the Texas Department of Criminal Justice who may be served with process at 209 West 14th, Price Daniel Building, Austin, Texas.

5. Defendants Adman Polunsky, John David Franz, Nancy Patton, Carole S. Young, Alfred Moran, Patricia Day, Lawrence Francis, A.M. Stringfellow and Carol S. Vance are members and former chairpersons of the Board of the Texas Department of Criminal Justice and may be served with process at 209 West 14th, Price Daniel Building, Austin. Texas.

6. Defendants Unknown Agents or Employees of the Texas Department of Criminal Justice may be served with process at 209 West 14th, Price Daniel Building, Austin, Texas.

7. Defendant Latham Boone may be served with process at 1224 University Avenue, Suite 100, Huntsville, Texas 77340.

8. Defendant Ray Montgomery may be served with process in the Office of the District Attorney at 101 W. Main Street, Madisonville, Texas 77864.

9. All Texas Department of Criminal Justice Defendants and the Texas Department of Criminal Justice will be served with process in the office of Wayne Scott in the Administrative Offices of The Texas Department of Criminal Justice at 815 11th Street, Huntsville, Texas 77340.

Jurisdiction and Venue

10. This case involves important questions of federal law including violations of federal rights under 42 U.S.C. Sections 1983, 1985 and 1988 and RICO. This Court therefore has original jurisdiction pursuant to 28 U.S.C. Section 1331 and 1343(a)(3). In addition, Plaintiffs allege violations of state law arising out of the same transaction and occurrences supporting the federal causes of action and therefore, this Court has supplemental jurisdiction over the pendent state law claims pursuant to 28 U.S.C. Section 1367.

11. Venue is proper in this district pursuant to 28 U.S.C. Section 1391(b) since some defendants and plaintiffs live in the area, a substantial part of the events giving rise to this litigation occurred there, and a substantial part of the property [i.e. the prison] is situated there.

Factual Allegations

12. The plaintiffs are all former employees of the Texas Department of Criminal Justice who were in good standing at the time of the riots on or about October 7th, 1994. Harville had notified the authorities about dangerous conditions in the unit prior to this date, including a number of circumstances that presented danger to the inmate population as well as the staff population. All of the plaintiffs had received good evaluations prior to being terminated from the Department of Criminal Justice.

13. There were a number of instances of excessive force being used against inmates in TDCJ. Importantly, among Harville's complaints was a complaint relating to a young correctional officer who he felt would ultimately cause harm to himself, other staff or inmates. Nothing was done to address his conduct.

14. On or about October 7, 1994 there were two riots that occurred on the Terrell Unit. One riot occurred which involved 250 inmates and 13 officers involving building 8. The other involved Building 7AA, the temporary segregation building.

The riots were required to be reported electronically, and were also reported by telephone. However, since the first riot was not properly reported, the unit was not ready as it would to have been to contend with further disturbances. Other riots had occurred there previously, and at least one of which the management of the facility had prior knowledge. As a result of these riots, an inmate named McCoy was killed. He was beaten near death, then drug down the stairs with his head bumping the stairs. McCoy was not immediately taken to the hospital as Robinson was, and Robinson had only minor scratches. This incident would not have occurred if segregated inmates had not been placed in facilities that were inadequate to handle them. Robinson threw urine and or spit on Angela Nickerson, and she attempted to get the officer in charge to come in and handle the situation. The officer in charge did not respond so she requested that her husband Kevin, a high security correctional officer with the rank of Sergeant, come and attend to the situation. The Nickersons, Harville, Silver Duncan and Joel Lambright went to Robinson's cell. After a scuffle ensued the officers defended themselves with only the use of necessary force to subdue the aggressive prisoner. Harville was not personally involved in the efforts to subdue the prisoner as he was at the time outside the cell. Both Harville and Angela Nickerson were splashed with inmate urine that evening and were denied medical treatment. Inmates were treated differently in a variety of ways, including access to medical facilities, and they

were improperly housed and some were wrongfully classified in the Terrell Unit.

15. Internal Affairs conducted an investigation into this matter after the incident had occurred. Some of the internal affairs officers involved coerced statements from the plaintiffs that were labeled as confessions, but actually did not admit any wrongdoing. Witness statements were highly irregular, and inaccurate. The plaintiff employees were never given any notification that they were found to have violated any rules of the department. They were dismissed from their positions with the Texas Department of Criminal Justice and criminal charges were brought against them by the Texas Department of Criminal Justice and the State of Texas. These charges were brought even though there was exculpatory evidence available that had been generated in the McCoy death investigation. This information was ordered to be turned over to the defense, but it never was. After a trial by jury, the Nickersons were acquitted on June 3, 1996. 10 days later on the 13th of June, charges were dismissed against Harville. The inmates testimony at trial was not consistent with their statements but was consistent with the exculpatory information in the McCoy murder file. An alleged misdemeanor against Harville wasn't filed.

16. Harville sought an expunction of his record and a complete expunction was opposed by the Texas Department of Criminal Justice. Harville's records were expunged, but not completely.

Though they desired to be rehired, none of the plaintiffs was allowed to come back to work at the Texas Department of Criminal Justice. The honesty of Harville was one reason given for the decision not to rehire him, a clear reference to the complaints that he had made about misconduct. Plaintiffs continue to have the stigma from the publicity in the news media and the wrongful terminations from their employment.

Causes of Action

A. 42 U.S.C. Section 1983

Plaintiffs adopt paragraphs 1 through 16 by reference as is fully set forth below.

42 U.S.C. Section 1983 creates a cause of action, at law or in equity, against any person who, while acting under color of state law, deprives a citizen of the United States of any right, privilege, or immunity secured by the U.S. Constitution or federal statute. To state a claim for relief under 42 U.S.C. Section 1983, a plaintiff must allege (1) that the Defendant was acting under color of state law and (2) that the Defendant's conduct deprived the plaintiff of federal rights. Plaintiffs rights against malicious prosecution, official oppression, the invasion of their privacy, the use of slander and libelous statements against them, wrongful discharge, being free from unreasonable searches and seizure, false arrest, the denial of the freedom of expression, the due process of and equal pro-

tection under the law and fraud are among the rights encompassed in this lawsuit.

B. 42 U.S.C. Section 1985 prohibits individuals from engaging in conspiracies to deprive an individual of various rights as guaranteed by the Constitution and other law.

C. Civil RICO prohibits racketeering activity when various unlawful actions involve wire or mail fraud and impede interstate commerce and further corrupt organizations.

D. Plaintiffs also allege a cause of action for civil conspiracy in that defendants acted in concert with others intended to accomplish an objective or course of faction against plaintiffs, and that they executed overt acts with the intention to damage plaintiffs as a proximate result of their actions.

E. The conduct of the individual defendants in their individual capacities was conspiratorial, intentional and outrageous. Plaintiffs seek punitive damages to prevent such treatment of themselves and others in the future.

F. The intentional actions of the defendants were extreme and outrageous and have caused the plaintiffs severe emotional distress. They have further suffered losses to their reputations due to the slanderous and libelous actions of the defendants in communicating information to the news media and also be disseminating false documents

relating to their dismissal to persons in and outside of TDCJ.

G. The defendants cause unnecessary and unwarranted invasions into the private lives of the plaintiffs that would be highly offensive to a reasonable person.

H. Plaintiffs allege a cause of action for fraud, in that defendant the individual defendants, except the Board Members made material representations that were false and that when made were known to be false or made recklessly without any knowledge of the truth and as a positive assertion by defendants; that it was the defendants' intention that the material representations be acted upon; that action then ensured and was a direct and proximate cause of damage to the plaintiffs.

I. The Plaintiffs continue to suffer in terms of their names and reputations due to the libelous and slanderous actions of the defendants. As provided by the 5th and 14th Amendments to the United States Constitutions and Article I Sections 13 and 19 of the Texas Constitution, the plaintiffs have a liberty interest in their names and reputations under the circumstances surrounding their dismissal.

Prayer

WHEREFORE PREMISES CONSIDERED, Plaintiffs pray that the Court take jurisdiction of this

case, that Defendants be cited to answer and appear; and upon final hearing:

1. Grant a declaratory judgment declaring a violation of Plaintiffs' rights under the First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution;

2. Grant appropriate compensatory, actual and punitive damages according to proof as provided by state or federal law;

3. Grant judgment against Defendants for violations of Plaintiffs rights under 42 U.S.C. Section 1983;

4. Grant judgment against Defendants for violations of Plaintiffs rights under 42 U.S.C. Section 1985;

5. Grant Plaintiff attorney's fees according to law, including those provided for under 42 U.S.C. Section 1988;

6. Reinstate plaintiffs as employees of the Texas Department of Criminal Justice with the appropriate equitable position;

7. Grant judgment against the Defendants for violating plaintiffs rights under the RICO law;

8. Grant judgment against the Defendants for fraud;

9. Grant judgment against the Defendants for the intentional infliction of emotional distress;

10. Grant judgment against the Defendants for invasion of privacy;

11. Grant judgment against the Defendants for civil conspiracy;

12. Award back pay and other relief to the plaintiffs;

13. Award all equitable relief to which the plaintiffs may show that they are entitled;

14. Award permanent injunctive relief against the defendants for continuing to engage in their actions in violation of law and court orders;

15. Enter an order clearing the names of the plaintiffs and ordering appropriate relief, or ordering that a name clearing hearing be held.

16. Grant such other and further relief, general and special, at law or in equity, to which plaintiffs may show themselves justly entitled.

Respectfully submitted,

/s/
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/s/ *
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S.B. # 02476500

*Signed with his express permission

Verification

I have read the aforementioned complaint and all of the facts contained therein are true and correct to the best of my knowledge and belief.

STATE OF TEXAS
COUNTY OF Nacogdoches

/s/_____
Affiant

SUBSCRIBED AND SWORN TO BEFORE ME a Notary in and for the State of Texas on this 3rd day of June 1998.

/s/_____
Notary Public

LYNDA LANGHAM
MY COMMISSION EXPIRES
February 18, 1999

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION

KEVIN AND ANGELA NICKERSON, and NEAL HARVILLE	§	
	§	
	§	
Plaintiffs	§	
	§	C.A. No.
	§	9:98CV136
STATE OF TEXAS, ET AL.	§	
	§	
Defendants.	§	

MOTION FOR NEW TRIAL OR TO RECONSIDER MOTIONS TO DISMISS, MOTION TO EXCEED THE PAGE LIMIT AND MOTION FOR LEAVE TO AMEND

TO THE HONORABLE JUDGE OF SAID COURT:

Comes now Kevin and Angela Nickerson and Neal Harville, by and through the undersigned attorney, and files this their "Motion for New Trial or to Reconsider Motions to Dismiss, Motion to Exceed the Page Limit and Motion for Leave to Amend" in response to the court's order granting Defendants' motion to dismiss, and in support thereof would show the following:

MOTION TO EXCEED PAGE LIMIT

This is a complex case with multiple defendants and motions. The order dismissing the case contained dismissals as to all of them. And since there is newly obtained evidence that will help illustrate an essential point the motion with its attachments may exceed the normal page limits—though all of the space taken is necessary to properly illustrate plaintiffs' positions.

MOTION FOR LEAVE TO AMEND

The plaintiffs submit that if given the opportunity they can come forth with facts that can show this court that a cause of action against the defendants may potentially succeed.

MOTION FOR NEW TRIAL
MOTION FOR RECONSIDERATION

I.

This is a lawsuit involving the libel, slander, defamation and other tortious actions against the plaintiffs that was filed in June of 1998. The defendants filed Motions to Dismiss and plaintiffs formally replied in July of 1998. The Court signed an order granting the Motion to Dismiss on the 18th of December that was filed on the 21st and mailed to the plaintiffs on the 22nd of December and received on the 28th of December.

There are several statements in the court's memo that should be addressed. The court notes

that Plaintiffs Nickerson were acquitted of any wrongdoing and that charges against Plaintiff Harville were dismissed, but the court follows up with, "Plaintiffs, despite their acquittal, attempted to regain employment at the Department of Criminal Justice, but failed. Plaintiffs, armed with an acquittal and dismissal of charges, respectively, most certainly did attempt to regain employment. Having been cleared of any allegations of wrongdoing. Plaintiffs were understandably desirous of returning to their jobs or similar positions at the Department of Criminal Justice. Plaintiffs were not guilty of the charges or allegations and (1) should not have been fired, and (2) should have been rehired.

II.

The motion for new trial is based on the manifest errors in law and fact plus newly discovered evidence. **See Brown v. Wright**, 688 F.2d 708, 710 (9th Cir. 1978); and **Wilcher v. City of Wilmington**, 924 F.Supp. 613, 616 (D. Del. 1996). The motion for reconsideration is based on the fact that the court erred in applying the law to the facts as the 12b motion should not be granted unless the court can determine to a certainty that the plaintiffs cannot prove any set of facts that would sustain any of its stated causes of action. **See Hishon v. King & Spalding**, 467 U.S. 69, 73, 104 S.Ct. 2229 (1984); and **Eason v. Holt**, 73 F.3d 600, 601 (5th Cir. 1996).

The defendants filed different motions to dismiss. The State of Texas alleged Eleventh

Amendment immunity, defendants Scott, Price, Jackson and Leonard alleged the statute of limitations on civil and tort claims, that RICO was inadequately pled and that there was no standing for the plaintiffs under Ruiz. Defendants Boone and Montgomery alleged absolute prosecutorial immunity and that there was no cause of action in the State of Texas for a constitutional violation. Polunsky, Vance, Franz, Francis, Stringfellow, Moran, Day, Patton and Young alleged there were insufficient facts to show RICO violations, that there was no shown connection between the tortfeasors and the alleged harm, and that the statute of limitations barred the claims. Defendant Collins alleged defective service.

III.

It is well established that when deciding a 12(b)(6) motion, the court must assume that all material facts in the complaint are true and view all assertions in the light most favorable to the plaintiff. The court must simply decide whether the plaintiff's complaint is legally sufficient and states a claim upon which relief can be granted. See **Doe v. Hillsboro,** 81 F.3d 1395, 1401 (5th Cir. 1996). The court should dismiss only if it can determine to a certainty that the plaintiffs cannot prove any set of facts that would entitle them to relief under the allegations made in the complaint. **See Hishon v. Spalding, supra** and **Conley v. Gibson**, 355 U.S. 41, 45, 46, 78 S. Ct. 99, 102 (1957).

The district court in its memorandum attached to the order indicates that (a) as to the civil and constitutional claims the applicable statutes of limitations have run; (b) as to the RICO claims at least two crimes must be alleged and only one was in the view of the court; and (c) there was no showing of standing under **Ruiz**; (d) the prosecutors were entitled to absolute prosecutorial immunity for their actions in this case; (e) service on defendants Collins was inadequate; and (f) the State is entitled to immunity under the Eleventh Amendment.

IV.

A. Defendant Collins

Rule 4 relating to service of process is meant to be a flexible rule "that should be liberally construed to uphold service so long as a party receives sufficient notice of the complaint. . . Technical defects in a summons do not justify dismissal unless a party is able to demonstrate actual prejudice. **See Chan v. Society**, 39 F.3d 1398, 1404 (9th Cir. 1994). No actual prejudice has been shown here. Collins has received the summons and been duly provided a copy of the lawsuit to review in a timely fashion. Sending the service to one's last known address is appropriate under Federal Rules of Civil Procedure 5(b). Service on Collins is sufficient under Rule 4(e)(1) which provides that "service upon an individual from whom a waiver has not been obtained and filed . . . may be effected in any judicial district of

the United States . . . pursuant to the law of the state in which the district court is located . . . for the service of the summons upon the defendant in an action brought in the courts of general jurisdiction of the State." Rule 121 of the Texas Rules of Civil Procedure provides that an answer shall constitute an appearance of the defendant so as to dispense with the necessity for the issuance of service of process upon him. Under the Texas Rules of Civil Procedure, this answer also constitutes a constructive appearance. Rule 4 is a flexible rule and should be liberally read to uphold service so long as the party receives sufficient notice of the complaint. Technical defects in a summons do not justify dismissal unless a party is able to demonstrate actual prejudice. See **Chan v. Society Expeditions, Inc., supra**.

B. Defendants Scott, Price, Jackson and Leonard; and Defendants Polunsky, Vance, Franz, Francis, Strongfellow, Moran, Day, Patton and Young

By concluding that the statute of limitations had run as to these defendants the court has decided that there are no facts that could be plead that would bring the matter within the limitations requirements of the law. First, it is clear that overt acts to further the tortious harm against the plaintiffs took place on June 3rd and thereafter. The decisions not to rehire, prosecute, give certain kinds of testimony or to fight expunction are matters that have clearly occurred within the requisite time period—and the matter relating to the rehiring of the plaintiffs continues to this day

so that harm still exists. The causes of action that this decision relates to include the following: 42 USC §§1983 and 1985, Civil RICO, civil conspiracy, intentional infliction of emotion distress, violation of the rights of privacy guaranteed by the Texas and United States Constitutions, fraud and State Constitutional violations. The state constitutional violations do not provide for damage relief but only equitable relief (which could include reinstatement) and attorneys fees. **See Jones v. Memorial Hospital System**, 740 S.W.2d 891 (Tex. App.—Houston [1st Dist.]). Those causes of action and the matters relating to libel and slander occurred after June 3, 1996. Every time a misstatement may have been repeated regarding one of the plaintiffs to the media or other persons these causes of action may have again been invoked. And a most important point here is that the causes of action did not accrue until the defendants were acquitted or the cases dismissed—so all of the facts giving rise to these causes of action did not start to run until then at the earliest. **See Heck v. Humphrey**, 512 U.S. 477 (1994). If a civil matter would call into question the underlying prosecution then the civil cause of action by law has not accrued. **Heck, supra**. Further, one of the allegations here is fraud, and in situations involving this kind of alleged conduct the statute can be tolled as well. **See Bell v. Fowler**, 99 F.3d 262, 266 (8th Cir. 1996).

The statute of limitations for civil conspiracy and personal injury is 2 years pursuant to Section 16.003 of the Civil Practice and Remedies Code. The limitations period for libel or slander is

1 year under 16.002 of the Civil Practice and Remedies Code, but it can be delayed by the discovery rule as can fraud under Section 16.004 of the Civil Practice and Remedies Code which can also be tolled by the discovery rule. **See S.V. v. R.V.**, 933 S.W.2d 1, 23 (Tex. 1996).

It is also important to note that as to the RICO claims the court has indicated that only one underlying criminal offense was alleged in the complaint. However, it is clear that under the facts as shown or as could be shown that other causes of action could be utilized. Obstruction of justice is but one example, mail or wire fraud may be possible (the grant and payments therefor are no doubt sent by mail or wire and maybe even documents needed for use in the litigation) or a host of other potential offenses involving the deprivation of the plaintiff's civil rights. If the case is allowed to go forward it is obvious that the possibility of a second underlying offense could even more so manifest itself.

Also, it is important to note that the statute of limitations to these individual causes of action can be tolled for the above stated and other reasons under appropriate circumstances, and the plaintiffs would like an opportunity to develop facts to illustrate why the court should toll the statute in this instance. And as to the application of the **Ruiz** case it is clear that in order to enforce the order of the United States district court in light of the legal disabilities, etc. associated with prisoners, and the security risks taken by guards like the plaintiffs that the court's order should

necessarily inure to the benefit of guards like the plaintiffs.

C. Boone and Montgomery

Boone and Montgomery should not be entitled to absolute prosecutorial immunity because (1) they performed functions that did not require that prosecutors perform them, and (2) due to the nature of the jobs they held traditional prosecutorial immunity does not apply. **See Kalina v. Fletcher**, 118 S.Ct. 502 (1997). When the prosecutors take actions that could have been undertaken by a notary public for example (as is the case here), they are entitled to absolute prosecutorial immunity. Further, the independence that is to be upheld by granting prosecutorial immunity is not present when the prosecutors are underneath mid-level managers in a large bureaucracy. **See Exhibit A attached hereto an incorporated for all purposes.** The grant contained therein was mailed with a cover letter printed on state stationery, and which lists three Texas Department of Criminal Justice financial officers as the designated grant officials. Plaintiff hereinafter will refer to such document as "Exhibit A." The grant document is authenticated with the affidavit of Barbara Day, who requested and received this information via the United States Mail.

D. The State of Texas Department of Criminal Justice

States are not totally exempt from litigation in federal court as a result of the Eleventh Amendment. Various kinds of injunctive relief may be granted. **Ex Parte Young**, 209 U.S. 123 (1908) and see also **Pennsylvania v. Union Gas**, 109 S.Ct. 2273 (1989). However, unless the statute is adopted pursuant to the Fourteenth Amendment Congress is without power to provide for causes of action for monetary damages against states as a result of the Eleventh Amendment. **Seminal Tribe v. Florida**, 116 S.Ct. 114 (1996). If plaintiff is to obtain equitable reinstatement pursuant to his state law constitutional claims it will probably be necessary for the State to be a party to this lawsuit so that appropriate relief can be rewarded.

V.

Plaintiffs' assertions in the original complaint present material issues of fact that are not appropriate for final dismissal under a 12(b) motion. The court should have allowed Plaintiffs to amend or re-plead.

WHEREFORE PREMISES CONSIDERED, Plaintiffs pray that this honorable court grant:

a. His motion to exceed the page limit requirements of the federal rules.
b. His motion for leave to amend;

c. His motion for reconsideration of defendants motion to dismiss;
d. His motion for new trial or in the alternative a hearing on the same;
e. Such other relief at law and equity to which they may show themselves to be justly entitled.

Respectfully Submitted,

/s/

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing Motion has been served by placing the same in the United States Mail on the 2nd day of January, 1999 to the following counsel of record:

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/s/
Gary L. Beldsoe